

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA**

**In the Matter of:**

**Application for Certification of  
Duke Energy for the  
Morro Bay Power Plant Project**

**Docket No. 00-AFC-12**

*(Application Complete  
January 10, 2001)*

**COMMITTEE ORDER IN RESPONSE TO  
APPLICANT'S MOTION FOR AN ORDER OF INTENDED DECISION**

**I. Background**

On July 25, 2002, pursuant to Sections 1716.5 and 1215 of the Commission's Regulations, Duke Energy Morro Bay LLC (Duke or Applicant) filed a *Motion for Order of Intended Decision* (Motion). On August 9, 2002, the Committee received responses to Duke's Motion from Commission staff (Staff), Coastal Alliance on Plant Expansion (CAPE), City of Morro Bay (City), and Central Coast Regional Water Quality Control Board (Regional Board).<sup>1</sup>

In its Motion, Duke asks that the Committee issue the requested order "as soon as possible and prior to issuance of the Presiding Member's Proposed Decision (PMPD)." Specifically, Duke seeks an immediate order regarding the following issues:

1. An order setting forth the Committee's intended decision regarding the appropriate baseline under the California Environmental Quality Act (CEQA) for assessing impacts from the reduced use of once-through ocean cooling as proposed by the Applicant;

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<sup>1</sup> Section 1716.5 of Commission regulations states that any responses to a petition such as Applicant's Motion shall be filed within 15 days of the original petition, unless otherwise specified by the Presiding Member.

2. An order setting forth the Committee's intended decision regarding whether the continued use of once-through ocean cooling, as proposed by the Applicant, will cause any significant, adverse impact(s) on the environment relative to the appropriate CEQA baseline; and
3. An order setting forth the Committee's intended decision regarding whether alternative cooling systems (such as dry or hybrid cooling) are feasible for this project and this site within the meaning of CEQA.

Duke states that it seeks this order for five reasons. First, that the Commission's record is now closed with regard to all issues other than habitat enhancement and therefore these issues are ripe for decision. Second, pursuant to its siting rules and regulations, the Committee has discretion to issue such an order where appropriate. Third, it is Duke's belief that responsible agencies such as the City and the Regional Board would benefit from knowing the Committee's views regarding these matters as soon as possible for their own jurisdictional purposes. Fourth, that all parties would benefit from knowing the Committee's views on these issues prior to hearings on the remaining Habitat Enhancement Plan (HEP) issues because the Committee's decision affects the purposes and standards applicable to the HEP. Fifth, that a timely order will inform important commercial decisions regarding the existing and proposed Morro Bay facility and the conduct of this proceeding.

The Committee has carefully considered Duke's Motion as well as the responses to the Motion by various parties and agencies.

## **II. Committee Order**

In this Order, the Committee grants the first point of Duke's Motion and denies the second and third. We address Duke's arguments in support of its Motion in the order in which they appear in the Motion.

First, there is no question that the hearing record is closed with regard to all three issues addressed in Duke's Motion<sup>2</sup>. We have taken all evidence on those matters and the issues have been fully briefed by the parties. In fact, the only portion of the evidentiary record which remains open pertains to Applicant's HEP proposal and to its pilot aquatic filter barrier (AFB) proposal. Accordingly, the issues identified in Duke's Motion are ripe for decision. Furthermore, Duke and Staff are correct that pursuant to Commission siting regulations the Committee has considerable latitude to conduct the proceeding as it sees fit. We are not persuaded by CAPE's argument that the lack of express authority in the regulations for issuing the requested order means that the Committee does not have such authority. CAPE's reliance on section 1749 *et seq.*, does not provide authority for limiting the Committee's discretion in this matter.

However, Duke's argument that a tentative decision would help agencies such as the Regional Board is largely undermined by a letter from Roger Briggs, Executive Officer of the Regional Board, urging the Committee not to do so<sup>3</sup>. The letter states that it has no objection to the Committee making a preliminary decision regarding the appropriate CEQA baseline or on whether environmental impacts from Duke's proposed modernized plant will exceed that baseline. However, the Regional Board objects to an early decision on the feasibility of alternative cooling systems (such as dry or hybrid cooling) for the project.

The Regional Board offers four reasons for opposing Duke's request for an early decision on the feasibility of cooling alternatives. First, since Duke delayed proposing the HEP until after the Final Staff Assessment (FSA) was issued, Duke's concern regarding permitting delays should not be a consideration in the

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<sup>2</sup> 6/6/02 RT 380-381. However, by statute the record remains open to receive the report of the California Coastal Commission, pursuant to Public Resources Code section 30413(d). This report is discussed more *infra*.

<sup>3</sup> The position is expressed on behalf of the staff of the Regional Board. The Board itself has not yet taken a formal vote on this matter, or on the Duke's Nation Pollution Discharge Elimination System (NPDES) permit.

Committee's determination on Duke's Motion. Second, the feasibility of dry cooling and other alternatives is central to the Regional Board's determination of Best Technology Available (BTA) under section 316(b) of the Clean Water Act. They argue that it is not appropriate for the Committee to make a decision on a section 316(b) issue before the Regional Board staff has an opportunity to issue its draft NPDES permit pursuant to its jurisdiction under the Clean Water Act<sup>4</sup>. Third, the Regional Board notes that in the event the Committee determines that the project will have significant adverse effects above a CEQA baseline level, the Committee should not prematurely rule out any potential mitigation measure before it has reviewed all potential mitigation. Thus, dry cooling should not be eliminated before the Committee can hear arguments on the HEP as a potential mitigation measure. Finally, they point out that a preliminary decision order would not be binding upon the Committee, the full Commission, or the Regional Water Board. Therefore, such a preliminary decision could not be relied upon by the other agencies, or by the City for their own jurisdictional decisions.

We agree with the Regional Board that had Duke provided details of its HEP at an early point in the process, the HEP could have been analyzed in the FSA, to the benefit of all parties. We do not believe it is appropriate to now accelerate an essential portion of our siting process in the face of Applicant's delay in presenting its HEP. Furthermore, we defer to the Regional Board's request for adequate time to evaluate a detailed HEP as part of the Regional Board's process for issuing its draft NPDES permit.

In addition, the California Coastal Commission would not benefit by Duke's proposed Motion. As CAPE points out in its response, Public Resources Code section 30413(d) requires the Coastal Commission to provide to this Commission its findings on various matters which affect the coastal zone. Public Resources Code section 25523(b) and section 1752(c) of the Commission's regulations

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<sup>4</sup> The Regional Board's letter states that its staff does not expect to release the draft NPDES permit before late September or early October.

require the Commission to include in its decision specific provisions to meet the objectives identified in the Coastal Commission's report<sup>5</sup>. Thus, the Committee cannot issue a proposed decision prior to receiving and considering the Coastal Commission's report. To do so would fly in the face of our statute and regulations to issue a preliminary decision on matters which the Coastal Commission will certainly address, without first receiving that Commission's report on those matters.

The City pleads that a prompt decision on Duke's Motion will allow the City to make long-range planning and budgetary decisions. Such a preliminary order may assist the City with planning and negotiations. However, due to the unratified nature of such an order, it cannot realistically be relied upon by the City to support major commitments concerning the project. Furthermore, we find that in light of the importance and complexity of the second and third issues in Duke's Motion, the limited help that a preliminary decision may provide is out weighed by other Committee concerns. These concerns include the Committee's own need for deliberation on major issues in this case and our obligations to all the parties in this case. Ultimately, the parties and the public are best served by a well-reasoned decision upon which they can rely.

Duke also argues that all parties would benefit from a preliminary decision prior to hearings on the HEP, since such a decision would affect the "purposes and standards applicable to the HEP." However, whether the HEP is evaluated as mitigation under CEQA or as BTA under the Clean Water Act, it will require a similar level of review at the hearings<sup>6</sup>.

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<sup>5</sup> The Commission must include in its decision the specific provisions identified in the Coastal Commission report pursuant to Public Resources Code section 30413(d) "unless the [Energy] commission finds that adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provision proposed in the report would not be feasible." [Public Resources Code section 25523(b).]

<sup>6</sup> The Commission has an independent responsibility to review the project's compliance with applicable laws, ordinances, regulations, and standards, (LORS), including its compliance with section 316(b) of the Clean Water Act.

Finally, Duke urges that a timely Committee order would “inform important commercial decisions” by Duke. While we acknowledge that even a tentative order could be relevant to commercial decisions, that fact does not outweigh the Committee’s need to fully consider the issues in question and provide a Presiding Member’s Proposed Decision (PMPD) which contains all the Committee’s logic and reasoning, as well as the appropriate Conditions of Certification. In the long run, we believe this approach will generate a better and more reliable result.

Nevertheless, it is appropriate to grant a determination on the first part of Duke’s Motion concerning the appropriate CEQA baseline. The Committee has previously ruled on this question, but additional specificity is now called for to eliminate further confusion. At an August 16, 2001, Status Conference, the Committee ruled that Staff would be required to perform an analysis using an environmental baseline consisting of the amount of cooling water pumped by the existing Morro Bay power plant averaged over the most recent five year period. (8/16/02 RT 168.) We now clarify that period as being the five years prior to filing the Application for Certification (AFC), in other words the average water intake for the years 1996 through 2000.

In conclusion, we grant Duke’s Motion as to the first matter and deny it as to points two and three.

By order of the Committee on August 30, 2002

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WILLIAM J. KEESE  
Chairman and Presiding Member  
Morro Bay AFC Committee

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JAMES D. BOYD  
Commissioner and Associate Member  
Morro Bay AFC Committee